mortgagor subject only to the pre-existing encumbrances, and the discharge of the prior mortgage must enure to his benefit.[14]

IMMUNITY OF PARTIES, WITNESSES, AND ATTORNEYS FROM CIVIL PROCESS.—The privilege of exemption from civil process which a suitor or witness had at common law while necessarily[1] without the jurisdiction of his residence for the purpose of attending a judicial proceeding as either party or witness, is a very ancient one, first mentioned in a Year Book of Henry VI.[2] The rule is one of public policy almost universally recognized,[3] and exists independent of statute because it is necessary to the due administration of justice, as otherwise one might hesitate to go into another jurisdiction to testify or protect his rights, with a consequent miscarriage of justice,[4] especially in a criminal case where depositions are inadmissible against the accused.[5] The privilege had its origin when the process was arrest, but it is now generally held to cover service of summons as well as arrest, as there is no difference between them on principle, except in the degree of annoyance, and both are equally within the mischief intended to be prevented.[6] The reason for exemption from summons as well as arrest is particularly strong in this country, under our jurisdictional system, where the place of service determines the place of trial.[7] The leverage obtained by a litigant over his adversary, by getting service in a jurisdiction local as to one and foreign as to the other, is great, and might easily impel the latter to surrender his right and privilege of attending a trial, so as to avoid possible service should he invade the other jurisdiction.[8] While the usual case is one in which the

[14]Cowley *v.* Shelby (1881) 71 Ala. 122; Teevan *v.* Smith (1882) 20 Ch. D. 724, 729. The result is the same under the lien theory of mortgages. Twombly *v.* Cassidy (1880) 82 N. Y. 155; Carpentier *v.* Brenham (1870) 40 Cal. 221.

[1]The presence of a suitor at the actual trial is conclusively presumed to be necessary, see Parker *v.* Marco (1893) 136 N. Y. 585, 590, 32 N. E. 989, and it may be necessary under other circumstances, *e. g.*, to consult counsel during the argument of a demurrer, Kinne *v.* Lant (C. C. 1895) 68 Fed. 436, 441, or to attend the deposition of a witness. Parker *v.* Marco, *supra*. A witness is not immune if he comes in on private business as well. 9 Columbia Law Rev. 273.

[2]Year Book, 20 Hen. VI, 10; Vin. Abr. Tit. "Privilege".

[3]Minnich *v.* Packard (1908) 42 Ind. App. 371, 85 N. E. 787.

[4]Wilson Sew. Mach. Co. *v.* Wilson (1884) 51 Conn. 595; Person *v.* Grier (1876) 66 N. Y. 124; Sherman *v.* Gundlach (1887) 37 Minn. 118, 33 N. W. 549.

[5]Kauffman *v.* Kennedy (C. C. 1885) 25 Fed. 785.

[6]Kinne *v.* Lant, *supra*; Person *v.* Grier, *supra*; *contra*, Ellis *v.* Degarmo (1892) 17 R. I. 715, 24 Atl. 579. But that a legislator is immune from arrest only and not from service of summons, see 16 Columbia Law Rev. 249.

[7]Holmes *v.* Nelson (Pa. 1850) 1 Phila. 217; *cf.* Hale *v.* Wharton (C. C. 1896) 73 Fed. 739, 742.

[8]A party may be granted a writ of protection, but this proceeding, while proper, is not at all necessary, and only furnishes a convenient warning to the process-server, see Parker *v.* Marco, *supra*; Larned *v.* Griffin (C. C. 1882) 12 Fed. 590, to save him from possible punishment for contempt, Bridges *v.* Sheldon (C. C. 1880) 7 Fed. 17; *In re* Healey (1881) 53 Vt. 694.

person is a non-resident of the state in which he is served, the same reason for immunity exists where he simply lives in a county of the same state other than where served.[9] The immunity extends to every case where the attendance is a duty or necessity in conducting any proceeding of a judicial nature, and the tendency is to construe it liberally[10] so as to protect one *eundo, morando, et redeundo* who is attending not only an actual trial as a witness or party but also a hearing before a referee or master in chancery,[11] or assisting in taking a deposition before a commissioner or one representing the court *pro hac vice*,[12] even though the deposition is taken by agreement of the attorneys.[13]

In the last few years the doctrine has sprung up in the New York courts that the person claiming immunity from process must have come into the state voluntarily for the purpose of attending the judicial proceedings, and that such is not the case when he comes because of a subpoena previously served on him.[14] The doctrine seems to have arisen as the result of an *obiter* generalization[15] erroneously deduced from the rule that one who has been subjected to interstate rendition is not immune from civil process in the demanding state.[16] The New York rule is contrary to the apparently better rule of the federal courts, and it is historically unsound.[17]

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[9]Andrews *v.* Lembeck (1888) 46 Oh. St. 38, 18 N. E. 483; Mitchell *v.* Judge (1884) 53 Mich. 541, 19 N. W. 176; see Holmes *v.* Nelson, *supra.*

[10]Andrews *v.* Lembeck, *supra*; Parker *v.* Marco, *supra*; Roschynialski *v.* Hale (D. C. 1913) 201 Fed. 1017; see Cooper *v.* Wyman (1898) 122 N. C. 784, 29 S. E. 947; *contra*, Netograph Mfg. Co. *v.* Scrugham (1910) 197 N. Y. 377, 380, 90 N. E. 962.

[11]National Bank *v.* Ames (1888) 39 Minn. 179, 39 N. W. 308.

[12]Bridges *v.* Sheldon, *supra*; Parker *v.* Marco, *supra.*

[13]Roschynialski *v.* Hale, *supra*; *contra*, Greer *v.* Young (1887) 120 Ill. 184, 11 N. E. 167. But that the immunity is then good only against the opposite party, see Partridge *v.* Powell (1897) 180 Pa. 22, 36 Atl. 419.

[14]Dwelle *v.* Allen (1912) 151 App. Div. 717, 136 N. Y. Supp. 216. But he does not lose his right to exemption if, after his voluntary appearance as witness in an action, he is served with a subpœna which is in force when the summons is served. Bunce *v.* Humphrey (1915) 214 N. Y. 21, 108 N. E. 95.

[15]Netograph Mfg. Co. *v.* Scrugham, *supra*, holding that one charged with crime but out on bail is in the constructive custody of the law, comes back into the state for trial under compulsion of law, and hence is no more entitled to immunity from civil process than one actually in custody under criminal process. *Contra*, Martin *v.* Bacon (1905) 76 Ark. 158, 88 S. W. 863; Kaufman *v.* Garner (C. C. 1909) 173 Fed. 550; Murray *v.* Wilcox (1904) 122 Iowa, 188, 97 N. W. 1087; Palmer *v.* Rowan (1887) 21 Neb. 452, 32 N. W. 210; see 10 Columbia Law Rev. 167.

[16]Rutledge *v.* Krauss (1906) 73 N. J. L. 397, 63 Atl. 988; Reid *v.* Ham (1893) 54 Minn. 305, 56 N. W. 35; *contra*, Moletor *v.* Sinnen (1890) 76 Wis. 308, 44 N. W. 1099; see *In re* Little (1902) 129 Mich. 454, 89 N. W. 38.

[17]Dwelle *v.* Allen (D. C. 1912) 193 Fed. 546; Sherman *v.* Gundlach, *supra.* It has been said that a non-resident defendant is immune, even if a plaintiff is not, because the defendant's appearance is compulsory. Wilson Sew. Mach. Co. *v.* Wilson, *supra.*

The privilege is almost universally granted to non-resident witnesses,[18] and it is generally agreed that it should apply to parties also, as one should feel perfectly free from fear in defending or prosecuting his rights,[19] though some courts have refused to extend to a plaintiff who voluntarily comes into the state to sue.[20] The modern rule allowing parties to testify ought to entitle them to the same immunity as other witnesses in every case when they attend for that purpose,[21] unless it could be said that their attendance then was not purely in aid of justice, but self interested.[22] But in the relatively few cases where the party was not also a potential witness, the courts have generally still held him immune, recognizing that his presence, apart from his testimony, might be essential to justice.[23] It has been said that the common law rule of policy extends not only to witnesses and parties, but also to attorneys assisting in the administration of justice.[24] But the court in *Nelson* v. *McNulty* (Minn. 1917) 160 N. W. 795, held that the exemption did not extend to the attorney of a non-resident corporation, who was also one of its officers, who came into the state to take a deposition for use in a trial pending in the state of his residence. The fact that he was an officer of the defendant corporation and had come into the state in its behalf probably would not protect him in his individual capacity.[25] However, it does

[18]Person *v.* Grier, *supra*; see Capwell *v.* Sipe (1891) 17 R. I. 475, 23 Atl. 14.

[19]Hale *v.* Wharton, *supra*; Roberts *v.* Thompson (1912) 149 App. Div. 437, 134 N. Y. Supp. 363; Minnich *v.* Packard, *supra*. Rhode Island protects a non-resident witness from all civil process; see Capwell *v.* Sipe, *supra*; but merely discharges a party from arrest and will not abate the action unless there has been a special writ or order of protection, see Ellis *v.* Degarmo, *supra*, or unless he is a nominal party only, attending as a witness and not personally interested, see Capwell *v.* Sipe, *supra*.

[20]Bishop *v.* Vose (1858) 27 Conn. 1; *cf.* Wilson Sew. Mach. Co. *v.* Wilson, *supra*; see Baisley *v.* Baisley (1893) 113 Mo. 544, 21 S. W. 29. But the better view seems to be that there should be no distinction between plaintiff and defendant. Fisk *v.* Westover (1893) 4 S. D. 233, 55 N. W. 961; Roberts *v.* Thompson, *supra*; see Hale *v.* Wharton, *supra*.

[21]See Wilson *v.* Donaldson (1889) 117 Ind. 356, 20 N. E. 250.

[22]An exception to the rule seems to exist where a non-resident plaintiff is served in a suit for malicious prosecution in respect to the action which he comes in to prosecute. See Roberts *v.* Thompson, *supra*; Mullen *v.* Sanborn (1894) 79 Md. 364, 29 Atl. 522. This seems to be a manifestation of the general rule that neither witness nor party is immune from suit on a cause of action which arises while he is within the state. See Kinne *v.* Lant, *supra*, at p. 441.

[23]For example, where a party was attending the argument of a demurrer, Kinne *v.* Lant, *supra*, or the taking of a deposition of his adversary's witness; Bridges *v.* Sheldon, *supra*; Parker *v.* Marco, *supra*; and where the immunity of a witness was limited by statute to those subpœnaed, a party was held immune without a subpœna, Fisk *v.* Westover, *supra*. See also note 1, *supra*.

[24]Central Trust Co. *v.* Milwaukee St. Ry. (C. C. 1896) 74 Fed. 442; Hoffman *v.* Judge (1897) 113 Mich. 109, 71 N. W. 480; Holmes *v.* Nelson, *supra*: "Where the law requires any duty of a citizen, it will protect him in the discharge of that duty."

[25]Brooks *v.* State (Del. 1911) 79 Atl. 790; but *cf.* Holmes *v.* Nelson, *supra*.

seem that in pursuance of a more liberal policy, protection should have been granted to the defendant in this case on the ground that he was an attorney assisting in the administration of justice, and that his presence was necessary for that purpose,[26] just as it has been granted to a party in a similar situation.[27] The courts do not generally distinguish between attendance at a deposition and at a trial.[28]

ENJOINING SUITS IN FOREIGN JURISDICTIONS.—The power of a court of equity to enjoin a defendant within its jurisdiction from proceeding with an action in a foreign state was denied in the earliest reported case, apparently as an unwarranted interference with the proceedings of a foreign tribunal.[1] The error of this objection was, however, quickly recognized and it was declared that such an injunction was not a pretention to the exercise of judicial or administrative rights abroad but a mere exercise of control over the person of a resident.[2] Accordingly, the power of equity to issue such an injunction when a proper case is presented has long been a settled principle of English jurisprudence.[3] In the United States, though this power is rarely invoked to restrain proceedings in the courts of a foreign nation, the same principles are applicable between sister states,[4] it being held that the decree of a court of one state restraining a defendant from the further prosecution of proceedings initiated in another, does not fail to give to those proceedings the "full faith and credit" afforded to them by the laws of the latter state.[5]

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[26]Central Trust Co. *v.* Milwaukee St. Ry., *supra.*

[27]Parker *v.* Marco, *supra;* Larned *v.* Griffin, *supra;* see Roschynialski *v.* Hale, *supra,* which expressly repudiates the doctrine of Greer *v.* Young, *supra,* on which Nelson *v.* McNulty, *supra,* is based.

[28]See notes 12, 13, 27, *supra.*

[1]Lowe *v.* Baker (1692) 6 Freem. 125, reported more fully as Love *v.* Baker, 1 Ch. Cas. *67, where *cf.* the reporter's remark: *"Sed quaere,* for all the Bar was of another Opinion".

[2]Portarlington *v.* Soulby (1834) 3 Myl. & K. 104; Busby *v.* Munday (1821) 5 Madd. 297.

[3]Story, Eq. Jur. § 900; M'Intosh *v.* Ogilvie (1747) 3 Swanst. 365, n.; Beauchamp *v.* Marquis of Huntley (1822) Jac. 546. The power is dependent solely on the defendant's being within reach of the court's process. It is not affected by the fact that the property which is the subject matter of the controversy is located in the foreign country. Bunbury *v.* Bunbury (1839) 1 Beav. *318; Beckford *v.* Kemble (1822) 1 Sim. & Stu. 7.

[4]Dehon *v.* Foster (1862) 86 Mass. 545; Angle *v.* Scheuerman (1869) 40 Ga. 206; Miller *v.* Gittings (1897) 85 Md. 601, 37 Atl. 372; and cases *infra.* The doctrine was formerly enunciated by New York courts of chancery that considerations of interstate comity forbade the issuance of an injunction whenever proceedings had been previously commenced in the courts of another state. See Mead *v.* Merritt (1831) 2 Paige, 402; Williams *v.* Ayrault (1860) 31 Barb. 364. This position was abandoned by later New York cases, which allowed the enjoining of a defendant, though in active prosecution of a foreign suit, whenever a "special case" was presented justifying equitable intervention. Vail *v.* Knapp (1867) 49 Barb. 299; Claflin & Co. *v.* Hamlin (1881) 62 How. Pr. 284; Kittle *v.* Kittle (1878) 8 Daly, 72.

[5]Cole *v.* Cunningham (1890) 133 U. S. 107, 10 Sup. Ct. 269. Three judges dissented on the ground that the exercise of the power was unconstitutional.